MOTION FILED
FEB 20 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-883

FEDERAL POWER COMMISSION, *Petitioner*
v.
JOHN E. MOSS, ET AL., *Respondents*

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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February 20, 1975

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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The Interstate Natural Gas Association of America (INGAA) respectfully moves for leave to file the attached brief *amicus curiae* in this case. As indicated by letters contemporaneously filed herewith, INGAA has obtained the consent of the petitioner, Federal Power Commission, as well as the following parties to the proceeding in the court below: petitioners Amoco Production Company, American Public Gas Associations, American Public Power Association and Consumer Federation of America, and intervenors Mobil Oil Corporation, Consumers Union of United States,

Inc., Continental Oil Company, Associated Gas Distributors and the Public Service Commission for the State of New York. John E. Moss, et al., respondents herein, have declined to consent. INGAA has been unable through telephonic or postal means to make contact with or to obtain consent or denial from Hamilton Treadway, Esq., who participated as *amicus curiae* in the proceeding in the court below.

INGAA is a non-profit association. Its members include most of the natural gas transmission companies subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U.S.C. §717, *et seq.* Their operations account for more than 90% of the gas transported and sold annually in interstate commerce in the United States.

INGAA has participated in the past as an intervenor or *amicus curiae* before this Court and various United States Courts of Appeals. It undertakes to participate in cases which directly and significantly affect the interests and operations of its membership and which have substantial industry-wide consequences. This is such a case.

INGAA is deeply concerned that the decision below if affirmed could eliminate a significant source of natural gas for the interstate market which the pipeline companies urgently need in order to minimize curtailments in service to their customers, a problem which has assumed grave national proportions.

Because of the critical shortfall in natural gas supplies which this Court has judicially noticed [1] and the existing regulatory constraints on developing new sup-

[1] *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626 (1972).

plies for interstate pipelines, the interstate lines have found it increasingly difficult to satisfy the requirements of their customers, resulting in industrial plant closures in many sections of the country with resultant unemployment and general economic dislocation. In the recent past the largest portion of new gas coming into the interstate market has been gas purchased pursuant to the optional procedure which is the subject of review here i.e., pre-granted abandonment, or pursuant to limited term and temporary purchase provisions of the Federal Power Commission's Regulations under the Natural Gas Act.[2] INGAA concurs with the decision of the court below to the extent it upholds the Commissions existing optional pricing procedure, but opposes that decision to the extent it would disallow pre-granted abandonment authorization. The decision of the court below has cast a serious cloud on the continued viability of these pre-granted abandonment provisions to the point that very little new gas onshore is being made available to the interstate buyers.[3] This creates an intolerable situation for the interstate pipelines and the millions of consumers through-

[2] 18 CFR 2.70. In 1973, e.g., the last full year for which data are presently available, sixty-four percent (64%) of all gas committed to interstate commerce was in accordance with the pre-granted abandonment or temporary sales provisions. See testimony of Hon. John S. Nassikas, Chairman, Federal Power Commission, Hearings before Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, June 11, 1974.

[3] Since the wellhead price of gas in the intrastate market is not subject to controls the bulk of new onshore gas has been diverted away from the interstate market to intrastate buyers. Natural gas produced on the Outer Continental Shelf (offshore) on Federal Lands is required by law to be sold in interstate commerce. See Outer Continental Shelf Lands Act, Sec. 5, 43 USC 1334(c).

out this nation who are dependent on these pipelines for their natural gas supplies.

Because of the overriding public interest in having the important policy questions raised in the instant petition decided by this Court and the great impact the Court's ruling here could have on the interstate pipeline industry and the public it serves, INGAA believes it appropriate to submit this *amicus curiae* brief in support of Petitioner.

INGAA, therefore, respectfully requests leave to file such brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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February 20, 1975

INDEX

	Page
ARGUMENT	2
BACKGROUND	2
THE HOLDING OF THE COURT BELOW	3
DECISION BELOW IS IN ERROR AND SHOULD BE REVISED	4
CONCLUSION	7
CERTIFICATE OF SERVICE	8

CITATIONS

CASES:

John E. Moss, et al. v. *Federal Power Commission*, 502 F.2d 461	4
Mobil Oil Corporation v. *Federal Power Commission*, — U.S. —, 41 L. Ed. 2d 72, 94 S. Ct. — (Decided June 10, 1974)	2
Sun Oil Co. v. *Federal Power Commission*, 364 U.S. 170	5
Sunray Mid-Continent Oil Co. v. *Federal Power Commission*, 239 F.2d 97, reversed on other grounds, 353 U.S. 944	4
Sunray Mid-Continent Oil Co. v. *Federal Power Commission*, 267 F.2d 471, affirmed, 364, U.S. 137	5
Order 455—Statement of Policy Relating to Optional Procedures for Certificating New Producer Sales of Natural Gas	2
Order 455A, Order Clarifying Order, and Denying Applications for Rehearing	2

STATUTES AND REGULATIONS:

Natural Gas Act, 52 Stat. 821, *et seq.*, as amended:	
Section 7(b), 15 U.S.C. 717f(b)	1, 2, 3, 4
Section 7(c), 17 U.S.C. 717f(c)	4, 5
Section 7(e), 17 U.S.C. 717f(e)	4, 5
18 C.F.R. 2.70	5, 6
18 C.F.R. 2.75(e)	3, 4, 7

MISCELLANEOUS DOCUMENTS:

A Realistic View of U.S. Natural Gas Supply, FPC Staff Report, issued December 1974	3

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AMICUS CURIAE BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

The Interstate Natural Gas Association of America (INGAA) respectfully submits this brief as *amicus curiae* in support of Petitioner Federal Power Commission. It is INGAA's position that the decision of the court below, insofar as it declared unlawful the pre-granted abandonment provision of Commission Order No. 455, is directly in conflict not only with past decisions of this Court but also with decisions of the Tenth Circuit Court of Appeals which held, contrary to the D. C. Circuit's ruling, that the Commission has the power under the Natural Gas Act (Act) (15 USC 717f(b)) to grant limited-term certificates of public

convenience and necessity. The decision below in this respect is in error and should be reversed. INGAA's interest is set forth in its Motion For Leave to File *Amicus Curiae* Brief.

ARGUMENT

Background

Recognizing the urgent need to bridge the widening gap between existing demands for natural gas and available supplies, the Federal Power Commission (Commission or FPC), by Order Nos. 455 and 455A (issued August 3, 1972, and September 8, 1972, respectively) enacted an Optional Pricing procedure for certificating new producer sales of natural gas. An integral part of the new procedure was the Commission's determination that upon a proper showing by applicants therefor, it would grant limited term certificates of public convenience and necessity, i.e., automatically terminable at the end of the period of time covered by the certificate, without the grantee having to go through the abandonment procedures prescribed by Section 7(b) of the Act (15 USC 717f(b)). The new procedure, the Commission found, was an attempt to lessen the rate uncertainty which had prevailed throughout 18 years of producer regulation and to encourage producers to commit gas to the interstate market. Such rate uncertainty, the Commission determined, not only prevented the producer from knowing how much he could lawfully charge[1] but seriously

[1] The history of producer price regulation by the Commission is replete with price rollbacks and other limitations, as well as lengthy drawn-out proceedings which have taken years to complete. See *Mobil Oil Corp.* v. *FPC*, —— U.S. —— 41 L.Ed. 2d 72, 94 S.Ct. —— (Decided June 10, 1974).

impeded domestic exploration and development for natural gas reserves and discouraged producers from committing gas to interstate pipelines. The Commission further recognized that in the absence of a regulatory mechanism designed to attract new dedications of natural gas reserves to the interstate market, the American consumer would not only have less natural gas available but would be forced to rely more heavily on substitute or supplemental supplies. These substitutes will be available to consumers, the Commission determined, only at costs significantly higher than the prices of currently available domestic wellhead supplies. Thus, the Commission concluded, the new gas supplies developed under the optional procedure, albeit at higher prices, would still result in a cheaper mix of energy supplies for consumers than the alternative of heavier reliance on substitute or supplemental supplies. In any event, these substitutes will not generally be available until the late 1970's or early 1980's.[2]

The Holding of The Court Below

On August 15, 1974, the D. C. Circuit rendered its decision upholding the Commission's orders in all respects except one. The court concluded that the pre-granted abandonment proviso (18 CFR 2.75(e)) violated Sec. 7(b) of the Natural Gas Act (15 USC 717f(b) *et seq.*) and must be set aside. The court determined that pre-granted abandonment "would leave a producer free to discontinue service to the interstate market perhaps years after the original certification with no contemporaneous obligation on the producer to justify withdrawal of services consistent with the

[2] See A Realistic View of U.S. Natural Gas Supply, FPC Staff Report, issued December 1974, p. 1.

public convenience and necessity." The court rejected the Commission's assertion that when a pre-granted application is before it for approval, it (the Commission) "may make the necessary findings required by Sec. 7(b) of the Act." This, the court said, entails "more clairvoyance than even the Commission's expertise reasonably encompasses." Moreover, the court found that pre-granted abandonment will not be subject to future review but instead "will be completely untrammeled." 502 F.2d 461, 472. The D.C. court denied the Commission's Petition for Rehearing *per curiam,* on September 19, 1974.

The Decision Below is in Error and Should Be Reversed

The D. C. Circuit erred in finding that pre-granted abandonment violated Sec. 7(b) of the Act. Insofar as the court's opinion sets aside Sec. 2.75(e) of the optional procedure, it is in direct conflict with two opinions of the Tenth Circuit and with decisions of this Court. In *Sunray Mid-Continent Oil Company* v. *FPC,* 239 F.2d 97 (Sunray I), reversed on other grounds, 353 U.S. 944, the Tenth Circuit squarely held that under Sections 7(c) and 7(e) of the Act (15 USC 717(c), (e)) the Commission in a proper case "may grant certificates of convenience and necessity for periods of limited duration." (Id. p. 100). This Court reversed the Tenth Circuit not upon the merits of the case but for the reason that the jurisdiction of the Court of Appeals was exhausted when it held that the Commission had authority to issue certificates of limited duration, and therefore no power remained to determine whether the applicant was entitled to such a limited certificate (353 U.S. 944, 945). Two years later, Sunray challenged another order in which the Commission denied the producer's request for a certificate tied to the terms of the underlying obligations of the parties' contract. Once again the Tenth Circuit affirmed the Commission but also *again* held that under Secs. 7(c) and 7(e) the FPC has the authority to issue certificates of limited duration under proper circumstances, *Sunray Mid-Continent Oil Co.* v. *FPC,* 267 F.2d 471 (Sunray II). On review this Court affirmed the Tenth Circuit's opinion in Sunray II (*Sunray Mid-Continental Oil Co.* v. *FPC,* 364 U.S. 137). The thrust of this Court's opinion in that case is set forth fully in the Petition for Writ of Certiorari and need not be repeated here. Suffice it to state that it demonstrates without question the error of the court below in setting aside pre-granted abandonment. This view is fortified by the Court's decision in *Sun Oil Co.* v. *FPC,* 364 U.S. 170, a companion case to *Sunray II* and issued simultaneously with *Sunray II.* While these decisions dealt with the question of the Commission's authority to issue permanent, unlimited certificates, the Court left no doubt as to the Commission's authority under proper circumstances to issue limited term certificates. In this respect the D. C. Circuit completely misconstrued this Court's holdings. Thus unless the Court grants the Commission's Petition and affirmatively resolves this conflict, considerable confusion could arise as to the extent of the Commission's authority to grant limited term certificates. Failure of this Court to act will exacerbate the already difficult task confronting interstate pipelines of acquiring new supplies of gas. For all practical purposes, long-term dedications of natural gas reserves to interstate lines are not presently available and the majority of purchases today are on a limited term or temporary basis pursuant to Sec. 2.70 of the Commissions' Regulations (18 CFR

2.70). Indeed, as stated in INGAA's Motion, in 1973, the last full year for which data are available, sixty-four percent (64%) of all gas purchased by interstate pipelines was under limited-term and temporary emergency authority.[3] While the D. C. Circuit's decision is not directed to Sec. 2.70 of the Commission's Regulations, it has nonetheless raised doubt as to the pre-granted abandonment aspects of that rule. It would be extremely unfortunate and portend grave consequences for the millions of consumers of natural gas in this country if this source of supply, limited though it may be, were to be effectively excluded from the interstate market. The critical supply shortage facing the Nation today behooves the Commission, the Courts, industry and all interested parties to take all reasonable steps to develop new reserves of this vital premium fuel. The Commission's orders below, including the provision for pre-granted abandonment were consistent with this objective and the Commission's innovative effort should be affirmed. The Commission's Petition therefore raises an important policy question of national significance which should be resolved by this Court.

[3] Of 1,237,000,000 Mcf of natural gas sales committed to the interstate market in calendar year 1973, approximately 790,000,000 Mcf were committed pursuant to limited-term procedures. While these volumes may appear small, they nonetheless contributed to the interstate pipelines' ability to meet peak winter season demands. See page 3 of INGAA's Motion herein, footnote 2.

CONCLUSION

The Commission's Petition For Writ of Certiorari should be granted. For the reasons stated the judgment of the lower court should be reversed insofar as it declared unlawful and set aside Section 2.75(e) of the Commission's rule, and the action of the Commission in adopting same should be affirmed.

Respectfully submitted,

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February 20, 1975

Certificate of Service

I certify that I have this day served the foregoing Motion for Leave to File Amicus Curiae Brief and Brief of the Interstate Natural Gas Association of America, Amicus Curiae, in Support of Petitioners, on all parties to the proceedings in accordance with the requirements of this Court's Rule 33.

DATED at Washington, D. C. this 20th day of February, 1975.

/s/ JEROME J. MCGRATH
Jerome J. McGrath